United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7373

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERALDINE SEVOR,

Plaintiff-Appellee,

B
P/S

-vs-

LITTON INDUSTRIES, INC., LITTON BUSINESS SYSTEMS, INC. and MCBEE SYSTEMS, A SUBSIDIARY OF LITTON INDUSTRIES,

Defendants-Appellants.

ON APPEAL FROM A DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 75-559

APPELLEE'S BRIEF

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TABLE OF AUTHORITIES CITED

STATUTES INVOLVED

United States Statutes

28 U.S.C. § 1292(b)

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. §1651

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

42 U.S.C. §2000e(b)

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe,or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5 of the United States Code), or (2) a bona fide private membership

(other than a labor organization) which is exempt from taxation under 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. §2000e-5(f)(3)

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. §2000e-5(e)

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge

shall be filed by the Commission with the State or local agency.

42 U.S.C. §2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

29 U.S.C. §255(a)

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compenstation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act-

(a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after the cause of action accrued, and every such such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Federal Regulations

29 C.F.R. §1601.11(b)

> Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person making a charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments alleging additional acts which constitute unlawful employment practices directly related to or growing out of the subject matter of the original charge will relate back to the original filing date.

Federal Rules of Civil Procedure

Service shall be made as follows: ********

4(d)(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

4(e) SAME: SERVICE UPON PARTY NOT INHABITATNT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenver a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

New York Statutes

Civil Practice Law and Rules

§301 A court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore.

§302(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Has Litton Industries, Inc., which does a substantial part of its entire business in the United States in New York State through its divisions and/or wholly owned subsidiaries which it operates and thoroughgoingly controls, been properly served in this case so as to give the court *in personam* jurisdiction?

2. Is Litton Industries, Inc., which represents that all of the work force of its divisions and/or wholly owned subsidiaries are its employees, an employer of the plaintiff within the meaning of Title VII and the Equal Pay Act?

3. Has the plaintiff, who filed her claims of employment discrimination on February 24, 1975 after her January 16, 1975 termination by the defendants, timely filed those claims pursuant to Title VII and the Equal Pay Act.

4. Does plaintiff, who complaints of defendants' illegal termination of her because of her sex and who complains of the pattern, practice, policy, custom and usage discrimination of the defendants state causes of action pursuant to Title VII and the Equal Pay Act?

5. Has plaintiff who made initial discovery demands for personnel records to compare the experience of herself and other women employees to the work experience of men employees in connection with her sex discrimination claims and who has requested the documentation of the pattern, practice, policy, custom and usage discrimination of the defendants, made proper demands for production of materials that must be produced in an employment discrimination?

COUNTERSTATEMENT OF THE CASE

Defendants appeal from the order of the District Court dated June 29, 1976 which denied defendants' motion that service of process against defendant, Litton Industries, Inc. be quashed, that the causes of action pleaded under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act be dismissed for failure to state claims and for failure of timely filing and that the pattern and practice allegations of the complaint be struck. (A. 246-248) Defendants had urged the District Court to consider their motions, originally made as motions to dismiss, as motions for summary judgment, (A. 177) and the District Court did so. The decision of the District Court followed this court's rulings in Egelston v. State University College at Geneseo, 535 F.2d 752 (2nd Cir. 1976) and Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976) wherein the court construed Title VII complaints, reversing the District Court's dismissals of complaints summarily, observing:

> "Occasionally, there is a tendency on the part of a judge to attempt to avoid a trial where it appears to him ab initio that the trial might be a waste of time or of no avail to the plaintiff. With the crowded dockets and delay occasioned by oppressive judicial workloads, a judge may well overlook the fact that a complaint states a valid cause of action or, out of a desire to eliminate an action which he considers frivolous, dismiss it before the curtain has risen on the case. Such conditions may have impelled Judge Burke to dismiss

Dr. Judy Elelston's Title VII complaint upon its face and without more. But it is important that we emphasize the principle that our concern for efficiency must never be permitted to outweigh our concern for individual rights-particularly when the bare allegations of a complaint, read in a light most favorable to the plaintiff, (as we must at this posture of the case) state a valid claim. Accordingly, we reverse the dismissal and remand for further proceedings."

* * * * * * * *

"It is well to set forth at the outset several general considerations that guide our disposition of this appeal. In our recent opinion in Heyman v. Commerce & Industry Inc. Co., 524 F.2d 1317, 1320 (2d Cir. 1975), we emphasized that summary judgment must be used sparingly 'since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.' Dismissal of a complaint-before any discovery has taken place or an answer filed-is even more drastic. It is a device that must not be employed unless, taking as true the allegations pleaded, Cooper v. Pate, 378 U.S. 546 (1964) it

> appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitled him to relief.

Scheuer v. Rhodes, 416 U.S. 232,236 (1974) quoting Conley v. Gibson, 355 U.S. 41,45-46 (1957).

There is an additional factor equally vital to the resolution of this case. Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer, yet its enforcement mechanisms are usually triggered by laymen. Were we to interpret the staute's procedural prerequisites stringently, the ultimate result would be to shield illegal discrimination from the reach of the Act.[2] Prior decisions, both of the Supreme Court[3] and of this Circuit have, for this reason, taken a flexible stance in interpreting Title VII's procedural provisions. We follow this realistic approach today. [footnotes omitted]

Egelston v. State University College at Geneseo, supra, at 753-755.

This is an action for injunctive relief, declaratory judgment and money damages. It arises under Title VII of the Civil Rights Act of 1964 and under the Equal Pay Act. As required by Title VII, the charges of discrimination were filed with the state deferral agency, the New York State Division of Human Rights, and with the Equal Employment Opportunity Commission-the former completed on or about February 24, 1975 when plaintiff was unrepresented by counsel and the latter, duplicate filing with the Commission completed on or about March 27, 1975. (A. 4-a, 50)

After the Equal Employment Opportunity Commission had properly deferred the charges, pursuant to law, a Right to Sue Notice was issued to plaintiff. Plaintiff filed her complaint herein on December 30, 1975, within ninety (90) days of receipt of the Right to Sue Notice. (A. 4-a-5)

Plaintiff initiated her complaints in February of 1975-immediately upon her having been terminated from her employment with the defendants as an outside sales person on or about January 16, 1975. Plaintiff had held this position with the defendants pursuant to a written employment contract with the defendants signed in December, 1974. (A. 9)

Defendants terminated plaintiff solely because of her sex. Defendants simply wanted to give plaintiff's job to a man who was less qualified than plaintiff solely because of the discriminatory desire to employ a man in preference to a woman. The man employee of the defendants who would supervise plaintiff has stated that he preferred to work with a man rather than a woman. Defendants' regional manager has stated that he does not want to take another chance on a woman employed for sales work because he believes that women hired for sales work have not "worked out." (A. 9, 10)

Plaintiff charges that her termination is discriminatory and a violation of Title VII. She further charges that this termination is part of the pattern, practice, custom and usage of discrimination engaged in by the defendants on the basis of a person's sex. She charges, for example, that the defendants have discriminated and are discriminating against her and other women by excluding them from certain job classifications, by paying women employees less than men employees, by hiring men only for the best-paying, career-oriented jobs, by excluding women from training programs while giving these opportunities to men, by promoting men to the best-paying, career-oriented jobs and denying these opportunities to women, by transferring employees with the objective of benefiting men to the detriment of women employees, by denying women employees titles and job status,

to which they are entitled,by using unvalidated appointment criteria for positions, by varying job standards and/or qualifications to accommodate employment of men employees, by fostering an atmosphere in the employment situation calculated to keep women employees in their place, and by retaliating against women employees for complaining of the illegal employment practices. (A. 6-9) She charges that even subsequent to her making complaint to the New York State Division of Human Rights and the Equal Employment Opportunity Commission that defendants have intimidated and harassed witnesses to the discrimination. (A. 10)

Plaintiff is a long time employee of defendant Litton Industries, Inc. The employment stretches from 1964 through the termination in January of 1975. (A. 5, 45)

Defendant Litton Industries, Inc. is a corporation which describes itself in its most recent Annual Report, July 31, 1975 (A. 57-118) as a company with 97,000 employees. (A. 61, 113) It has world wide operations-it describes itself as "...one of the world's major industrial corporations." (A. 109) It describes its principal United States plants as being located in 68 cities in 25 states with 72.3% of its United States operations located in 8 states-California, Pennsylvania, Connecticut, Mississippi, Illinois, Massachusetts, New York and Ohio. (A. 114)

The company is operated through organizational units which are described as division and/or wholly owned subsidiary corporations. (A. 89) However, regardless of the division and/or subsidiary nomenclature, the entire corporation is managed through a system of major groups and/or divisions described in the most recent Annual Report as Business Systems and Equipment, Defense, Commercial and Marine Systems, Industrial Systems and Equipment, and Professional Services and Equipment. (A. 109, 116) Each company group and/or division is headed by a corporate vice president of Litton Industries, Inc. The various divisions and/or subsidiary corporations within the Business Systems and Equipment Division of Litton Industries, Inc. are directly accountable to the Litton Industries, Inc. vice president and other Litton Industries, Inc. personnel on a constant basis. (A. 188-191)

Litton Industries, Inc. is constantly engaged in shuffling and re-shuffling its divisions and/or wholly owned subsidiaries within its primary corporate groups. For example, in its 1975 Annual Report, Litton Industries, Inc. describes its most recent reorganization efforts in the Business Systems and Equipment Group because of recent losses. (A. 60) Part of this reorganization included the integrating of the operations of the former Litton ABS (Automated Business Systems) division into the Sweda International and Kimball Systems divisions in September 1974. (A. 64)

The manipulation of the divisions and/or wholly owned subsidiary corporations of Litton Industries, Inc. to serve the perceived business convenience of the corporation is graphically illustrated through plaintiff's employment by Litton Industries, Inc. In 1965, plaintiff worked in a division of Litton known as Royal-McBee. Shortly thereafter, Litton split Royal-McBee into two other divisions which it called Royal Typewriter Co., Division of Litton Industries and McBee Systems, a Division of Litton Industries. About 1968, Litton Industries, Inc. changed the name of its McBee Systems Division to Litton Automated Business Systems, Division of Litton Industries, Inc. The product lines from McBee Systems and the automated equipment product lines from another Litton Industries division, Monroe International, were then consolidated under the Litton Division, Litton Automated Business Systems. About 1973, Litton Industries, Inc. reorganized the Litton Automated Business Systems Division making a McBee Systems Division and transferring the computer line of Litton Automated Business Systems to another Litton Industries, Inc. division, Sweda International. (A. 45, 46)

The management of Litton Industries, Inc. is interchangable with the management of its divisions and/or wholly owned subsidiaries. For example, the officers and directors of defendant Litton Business Systems, Inc., a New York corporation with a New York City, New York address,

a subsidiary of Litton Industries, Inc. are the same persons who serve as officers and directors of Litton Industries, Inc. (A. 47, 117, 119)

Securities for Litton Industries, Inc. are traded only under the company name. (A. 115) In fact, while plaintiff and other Litton Industries, Inc. employees were assigned to areas which were described as Litton Industries, Inc. divisions and/or wholly owned subsidiaries, plaintiff and other employees participated in what is described as the Litton Industries Employees' Stock Purchase Plan. Plaintiff and other employees received Litton Industries, Inc. stock pursuant to the plan. (A. 129, 130)

There is one annual report for all Litton Industries, Inc. operations, world-wide and however characterized. In fact, when counsel for the plaintiff requested copies of the various annual reports of what counsel for defendants described to the District Court as "autonomous" wholly owned subsidiaries of Litton Industries, Inc., in each instance, counsel for plaintiff was supplied with a copy of the Annual Report of Litton Industries, Inc. Thus, defendant Litton Business Systems, Inc. sent a copy of the Litton Industries, Inc. Annual Report. Litton Automated Business Systems Division, Litton Business Systems, Inc., and Sweda International did likewise. (A. 185, 192, 229, 230, 233-238) In fact, one processer of these requests for annual reports

noted that the request had already been filled by forwarding the Litton Industries, Inc. Annual Report. (A. 235, 236)

Litton Industries, Inc. holds itself out to the public and all of its employees as one integrated monolithic corporate entity. It has adopted one corporate symbol which it uses throughout its Annual Report, employment application forms, stationary and the like. The Litton logo, a blue square with a white rectangle, a white square and a white circle superimposed,  or the same symbol in varying colors, appears consistently on papers which refer either to Litton Industries, Inc. and/or any division and/or wholly owned subsidiary. For example, see the Annual Report (A. 117), the employment notice and agreement for Royal Typewriter Company, Inc., (A. 154), the Notice of Change in Employee Status of Automated Business Systems, Division of Litton Business Systems, Inc., (A. 156-159), the Notice of Change in Employee Status of Automated Business Systems, Division of Litton Industries, (A. 160, 161), the Notice of Change in Employee Status of Litton ABS, (A. 162, 163), the cancelled checks for Litton Business Systems, Inc., (A. 164, 165).

Whatever the subsidiary and/or the division of Litton Industries, Inc. it holds itself out to the public as an integral part of the Litton Industries, Inc. For example, Sweda International in advertising for employees describes itself as a division of Litton Industries, Inc. (A. 131) The listing in the Rochester Telephone Directory for

Litton reads "Litton ABS (see McBee Systems)." (A.48)

In fact, as far as plaintiff knows or was ever led to believe, she was an employee of Litton Industries, Inc. though she worked in various[illegible] described divisions and/or wholly owned subsidiaries of Litton Industries, Inc. during her employment. (A. 5, 45) When plaintiff first filed her complaint with the New York State Division of Human Rights, before she was represented by counsel, she describes herself as a Litton Industries, Inc. employee along with the other Litton Industries employees whom she alleges were engaged in the discrimination against her. (A. 168) In filing her federal complaint, plaintiff named the defendants by the commonly used and/or most currently used nomenclature, "Litton Industries and McBee Systems, a Subsidiary of Litton Industries." Plaintiff amended her complaint to state the full title, Litton Industries, Inc. and to state the current full title for Litton Automated Business Systems, Litton Business Systems, Inc. (A. 4a, 41)

The summons, complaint and First Notice to Produce were served on Litton Industries employee, David M. Miller at Rochester, New York on January 5, 1976. Mr. Miller accepted service on behalf of all defendants and described himself to the United States Marshal who made service, as the "Branch Manager." (A. 48, 49, 132)

Process in this matter had previously been served on all these defendants successfully by service on David M. Miller. After plaintiff had obtained counsel in connection with her administrative complaint to the New York State Division of Human Rights, a subpoena duces tecum issued on behalf of the plaintiff therein and requiring production of documents from the defendants was served on David M. Miller and accepted by David M. Miller on behalf of all defendants. No claim of improper service was ever made. In fact, we know from materials in the Division file relating to the appearance of the defendants before the Division that Litton Industries, Inc. appears generally for all defendants therein. (A. 133-135, 181)

However, upon being served in this action, defendants immediately denied that Mr. Miller was an employee of Litton Industries, that Mr. Miller was authorized in any respect to receive process for any of the defendants, that Litton Industries, Inc. does any business whatsoever in New York State, that Litton Industries, Inc. has any presence whatsoever in New York State and, as previously indicated, defendants moved to set aside service of process upon Litton Industries, Inc., to dismiss the complaint against Litton Industries, Inc. for lack of jurisdiction, to dismiss the complaint as to all causes of action for failure to state a claim and for failure to file timely and/or to strike the

pleading of the pattern and practice discrimination. (A. 21-31) At the same time, defendants filed general objections to plaintiff's First Notice to Produce suggesting that the very particular and precise requests were for materials "not relevant or material," that employee personnel records necessary to compare the terms, conditions and privileges of employment of plaintiff and other women similarly situated with men were "confidential" and should not be produced at all, and if produced, only with the permission of the employee, and that production, in general as requested, would be a "burden and a hardship." (A. 32-39)

Rather than engage in a time consuming and pointless debate over Mr. Miller's authority to receive process for the defendants, plaintiff caused additional service of the summons, complaint, amended complaint and First Notice to Produce to be made on Dan Johnson, who held himself out in his affidavit filed herein as duly authorized to receive process for all defendants. (A. 140, 182) The United States Marshal first delivered the additional process to Mr. Johnson's secretary, who accepted service for him. But, mindful of the defendants' established pattern of denying authority to receive such process subsequent to service, plaintiff caused the United States Marshal to return and make a personal service on Mr. Johnson. (A. 230)(The last summons served on Mr. Johnson contained a typographical error; the attorneys for the parties corrected the

error by written stipulation.) [A. 249, 250]

Notwithstanding the additional service of process on Mr. Johnson, who conceded his authority to receive such process in his affidavit to the court, defendants continued to assert that personal jurisdiction has not been obtained over Litton Industries, Inc. because Litton Industries, Inc. does no business in New York and is not present for any purpose whatsoever in New York-disregarding the unitary corporate structure of Litton Industries, Inc. outlined in its Annual Report, disregarding the interlocking directories between Litton Industries, Inc. and its divisions and/or wholly owned subsidiaries, disregarding the transcending corporate management of all divisions and/or wholly owned subsidiaries through the group vice presidents, for example. Litton Industries, Inc. is even asserting that it has not received notice of plaintiff's administrative filings.

As previously noted, plaintiff, when unrepresented by counsel before the New York State Division of Human Rights described herself and all of the parties involved in the discriminatory acts, as Litton Industries employees. Litton Industries, Inc. received notice of these claims as well as plaintiff's amendment to the complaint. Litton Industries, Inc. entered a general appearance on behalf of Litton Industries, Inc. by its counsel.

The Equal Employment Opportunity Commission, pursuant to Title VII, forwarded to Litton Industries, Inc., attention

the president, the Notice of Charge of Employment Discrimination. (A. 173) Litton Industries, Inc. is separately named therein. Likewise, Litton Industries, Inc. is separately named in the Right to Sue Notice issued by the Commission to the plaintiff preceding this lawsuit. Defendants acknowledge receipt of these notices. (A. 16, 143, 173)

On this record, the District Court denied defendants' request to dismiss, summarily, any of the plaintiff's claims against any of the defendants. The Court ordered that the defendant should comply with plaintiff's Notice to Produce "...at a mutually agreeable time and place on or before July 30, 1976," but if the parties weren't able to agree, the court would fix the time and place on "ex parte application." (A. 246-248) Defendants noticed an appeal of right (A. 251) but thereafter realized that none of the issues are appealable as of right, that the District Court's order is non-final and interlocutory.

Thus, while asserting that this court could still, conceivably hear their appeal under 28 U.S.C. §1651, (appellants' brief, pages 10, 11), appellants sought remand of the appeal for the purpose of requesting certification of some issue herein as appealable pursuant to 28 U.S.C. §1292(b). This Court granted the remand requested by the appellants on October 19, 1976 upon stipulation to such remand by counsel for all parties. The District Court, the Honorable John T. Curtin, sitting in the absence of the Honorable Harold P. Burke,

certified certain questions pursuant to 28 U.S.C. §1292(b) in opinion of November 16,1976. Appellants have petitioned this Court to review these questions in papers filed November 22,1976. Appellee is opposing such review, her answer having been filed November 29, 1976.

POINT I

LITTON INDUSTRIES, INC. WHICH IS PRESENT IN THE STATE OF NEW YORK THROUGH ITS THOROUGHGOINGLY CONTROLLED OPERATIONS OF ITS DIVISIONS AND/OR WHOLLY OWNED SUBSIDIARIES HAS BEEN PROPERLY SERVED WITH PROCESS; THE COURT HAS IN PERSONAM JURISDICTION OVER LITTON INDUSTRIES, INC.

As is outlined in detail in the Counterstatement of the Case, Litton Industries, Inc. is a corporation which transacts a very substantial part of its business in the United States within the State of New York through its thoroughly controlled and integrated operations of its divisions and/or wholly owned subsidiaries. Litton has been personally served in New York through its entities, defendants Litton Business Systems, Inc. and McBee Systems.

Defendants' sole basis for its appeal herein with respect to the service of Litton Industries, Inc. is its insistence that its characterization of Litton's divisions and/or wholly owned subsidiaries as "autonomous" must be accepted notwithstanding that documents generated by Litton Industries, Inc. such as its Annual Report substantiate that Litton and its divisions and/or subsidiaries are one in the same entity and/or Litton Industries, Inc. is present because its divisions and/or subsidiaries are agents acting for the parent. The District Court denied the summary judgment requested by the defendants-as it was required by the rule of

law-where any issue of material fact is in dispute, summary judgment must be denied. Poller v. C.B.S., 368 U.S. 464 (1962) The District Court further followed the rule of law that mandates, that, in this posture of the case, on a motion to dismiss, the complaint should not be dismissed unless it is clear, without a doubt, that the plaintiff cannot set forth any set of facts to support the claim upon which relief can be granted. Conley v. Gibson, 355 U.S. 41 (1957); Egelston v. State University College at Geneseo, supra; Noble v. University of Rochester, supra.

It is clear, on this basis, that the District Court was correct in denying defendants' motion to dismiss and/or for summary judgment in all respects, including the motion to quash service against Litton Industries, Inc. There is nothing in the District Court's decision which could persuade this court to grant an interlocutory appeal pursuant to 28 U.S.C. §1292(b).

In any event, should the court entertain defendants' appeal, the District Court must be affirmed in sustaining jurisdiction over Litton Industries, Inc. Appellants rely solely upon the recitation of the general proposition in law that service on a subsidiary is not valid service on a parent where two corporations operate as separate entities, and this Court's decision Cook v. Bostitch, 328 F.2d 1 (2nd Cir. 1964) to sustain their argument on quashing service.

Since this litigation involves federal claims arising under federal statute, federal law applies in determining whether the court possesses in personam jurisdiction over the defendants. Fraley v. Chesapeake and Ohio Railway Co., 397 F.2d 1 (3rd Cir. 1968). Thus, the Bostitch case, involving not a federal question but a diversity claim and involving the court in an analysis of state law with respect to service of process, is not controlling here. Further, Bostitch is completely distinguishable from this case on its facts; there the District Court found basis to conclude that the parent and subsidiary were autonomous. There is no basis for such a conclusion here and the District Court refused to quash service on Litton Industries, Inc.

With respect to suing of defendants in federal court on federal claims, this court has held that the test for sustaining service of process on a corporation is the "minimum contacts" standard which has been enumciated by the Supreme Court in McGee v. International Life Insurance, 355 U.S. 220 (1957) and in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The court has held that "minimal contacts" means that:

> "This must be more than an incidental contact with the state, although the

> party does not have to be authorized to do business in the state or have offices there. If the action of an agent of the party in the state is substantial, that would justify service on the defendant in that jurisdiction. See, Arpad Szabo v. Smedvig Tankrederi A.S., 95 F. Supp. 519, 522 (S.D.N.Y. 1951). If a defendant is found to have sufficient contacts to justify jurisdiction, complete and adequate personal service in compliance with the rules stated above must also be accomplished. It has been held that normally, the person in charge of the activities in the state which are the basis for the conclusion that the defendant is present is the managing agent for purposes of service. See Bomze v. Nardis Sportswear, 165 F. 2d 33 (2nd Cir. 1948). Grammenous v. Lemons, 457 F.2d 1067 (2nd Cir. 1972)"

Similarly, in Lone Star Package Car Co. v. Baltimore & Ohio Railroad Co., 212 F. 2d 147, 155 (5th Cir. 1954), the court noted that "...[T]he broad statements of policy expressed, particularly in the International Shoe Company case...seem to us to be extended also to cases where the jurisdiction of the federal court depends upon federal law." In this case, the defendant had no permit to do business in Texas and did no business in the state other than soliciting traffic from and to points in Texas; the court found the defendant subject to suit in federal district court in Texas.

The appropriateness of the District Court's exercising jurisdiction over Litton Industries, Inc. is underscored not only because Litton Industries, Inc. meets the federal "minimum contacts" standard but also because Title VII

in its special jurisdictional section, 42 U.S.C. §2000e-5(f)(3) confers such jurisdiction. It provides that:

> "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice..."

In this instance, the actions are brought in the judicial district where the unlawful employment practice is alleged to have been committed. Litton Industries, Inc. would be subject to this lawsuit in the Western District of New York federal court even if it had no presence whatsoever in the State of New York and even if its non-presence would require the framing of a special order by the court pursuant to Rule 4 (e) to effect service.[1]

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[1] As this Court noted in Grammenos v. Lemons, supra, at 1071, where service of process has not been adequate but where other means of service are available, a complaint should not be dismissed but arrangements should be made for service by the other means available.

Litton Industries, Inc. is of course present in New York State and has been properly served pursuant to Rule 4(d)(3) by delivering a copy of the summons and complaint to its managing or general agent and/or authorized agent for receipt of process. The relationship between Litton Industries, Inc. and its divisions and/or wholly owned subsidiaries are such as toconstitute service on the subsidiary to be service on the parent corporation because there is in realty only one corporate entity and/or the subsidiary and/or division acts as the agent of the parent. See generally, Moore's Federal Practice, Volume 2, ¶4.25[6]; Wright and Miller, Federal Practice and Procedure, §1104.

Even if we were to look to New York State law as to what would constitute sufficient service of Litton Industries, Inc. under New York State law, assuming service was completed pursuant to Rule 4 in the manner prescribed by New York State Law, valid service has been made on Litton Industries, Inc. and the court properly has jurisdiction over Litton Industries, Inc. This Court reviewing what constitutes good service under New York law and the obtaining of in personam jurisdiction over a corporation under New York law in Beja v. Jahangiri, 453 F. 2d 959 (2nd Cir. 1972), observed that the New York Court of Appeals has sustained in personam jurisdiction under the New York Civil Practice Law and Rules §301 over foreign corporations each time it has

considered the issue in the past decade. Beja v. Jahangiri, supra at 962. Applying New York law, this Court in Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2nd Cir. 1967), held that the conduct of a foreign corporation's vice-president in soliciting business and negotiating contracts in New York was sufficient to constitute "transacting any business within the state" within the meaning of New York's long arm statute long-arm statute so that the federal District Court had jurisdiction. In Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2nd Cir. 1967), the court found that a foreign corporation is "doing business" in New York within the meaning of New York Civil Practice Law and Rules §301 when its New York representative provides services beyond mere solicitation and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them the corporation's own officials would undertake to perform substantially similar services.

The New York Court of Appeals has found the acts of parent and subsidiary corporations to be acts of one on behalf of the other, interchangably, and/or has found a subsidiary to be the agent of the parent thereby sustaining service on the subsidiary as service on the parent corporation. See for example, Frummer v. Hilton Hotels International, Inc., 19 N.Y. 2d 533 (1967); Public Administrator v. Royal Bank of Canada, 19 N.Y. 2d 127 (1967); Taca International Airlines, S.A. v.

Rolls-Royce of England, Ltd., 15 N.Y. 2d 97 (1965).

Apparently, the case at hand is not the first time Litton Industries, Inc. has tried to insulate itself from liability for its operations by asserting that it is not present in a state doing business notwithstanding that it has divisions and/or wholly owned subsidiaries doing that business where it is being sued. In Handlos v. Litton Industries, Inc., 304 F. Supp. 347 (E.D. Wis. 1969), the court rejected Litton's"autonomous subsidiary"argument, applied the "minimum contacts" test and found jurisdiction over Litton Industries, Inc. holding that service on the subsidiary controlled by Litton Industries, Inc. was service on Litton Industries, Inc. The court underscored in reaching its conclusion the same facts as are present in this case:

1. That Litton Industries, Inc. had several subsidiary corporations actively engaged in business in the state.

2. That the annual reports of Litton Industries, Inc. represented to the public and to its shareholders that it controlled its subsidiaries.

3. That the annual report of Litton Industries, Inc. published a consolidated financial statement and thus represented its assets in the form of consolidated assets to its shareholders which indicated the close relationship between the parent and the subsidiaries.

4. That Litton Industries, Inc. held itself out to its shareholders and to the public as extending significant control over the subsidiaries.

5. That the subsdiaries held themselves out on letterheads and in advertising as divisions of Litton Industries, Inc.

Litton Industries, Inc. has been properly served with process. The District Court has in personam jurisdiction over Litton Industries, Inc.

POINT II

LITTON INDUSTRIES, INC. IS AN EMPLOYER OF PLAINTIFF WITHIN THE MEANING OF TITLE VII AND THE EQUAL PAY ACT

In a secondary attempt to avoid liability for the discrimination, Litton Industries, Inc. argues that it has never been the employer of the plaintiff within the meaning of Title VII or of the Equal Pay Act. An employer, as defined by Title VII, 42 U.S.C. §2000(e)(b) is a person (person includes a corporation) engaged in an industry affecting commerce which has 15 or more employeesfor each working day in each of 20 or more calendar weeks and any agent of such person.

Not only is the definition of employer broad under Title VII but the definition of employee is equally broad. Prospective employees may sue, discharged employees may sue, former employees may sue, organizations representing employees,

either generally or specifically may sue. See,for example, Tipler v. E.I.duPont de Nemours & Co., 3 EPD ¶8209 (6 Cir. 1971); Hackett v. McGuire Bros., Inc., 3 EPD ¶8276 (3rd Cir. 1971); Kohn v. Royall, Koegel & Wells, 6 EPD ¶8828 (D.C.N.Y. 1973); Oakland Federation of Teachers v. Oakland Unified School District, 9 EPD ¶10,079 (D.C. Ca. 1975); Richmond Black Police Officers Assn. v. City of Richmond, 386 F. Supp. 151 (D.C. Va. 1974); Women Employed v. Rinella & Rinella 10 EPD ¶10,330 (D.C. Ill. 1975); United Minority Workers v. International Union of Operating Engineers, 10 EPD ¶10,581 (D.C. Or. 1975).

As previously noted in the Counterstatement of the Case, Litton Industries is clearly an employer within the meaning of Title VII. The company describes all of its work force wherever assigned as its employees in its Annual Report. Plaintiff always understood that she was an employee of Litton Industries, Inc. although she from time to time performed services for a subdivision and/or wholly owned subsidiary of Litton Industries, Inc. which in effect are mere departmental units of one corporate entity, Litton Industries, Inc.

It is significant to note that on the receipt forms for the employee participant of the Litton Industries Employees' Stock Purchase Plan that the notice while referring to the particular Litton subsidiary and/or division refers to the

form as the Litton Industries, Inc. employee copy. In advertising for employees, such as the ad placed by Sweda International, Litton Industries, Inc. is held out to be the employer. (A. 131) That Litton Industries, Inc. has been the employer of plaintiff is further underscored in examining the Employment Notice and Agreement form of Royal Typewriter Co., Inc., a division of Litton Industries. (A. 154) Plaintiff's prior employment with the company is noted on the form setting forth the particular division and/or subsidiary of former employment; there is notation of the particular division and/or subsidiary to be charged with her salary.

The particular payroll account from which plaintiff's salary was drawn at any particular time is not the controlling factor in determining whether Litton Industries, Inc. was an employer of plaintiff. What is significant with respect to the employment forms and copies of the checks in the record is that Litton Industries, Inc. is consistently referred to in relation to the division and/or subsidiary in question. Litton Industries, Inc. has consistently held itself out as interchangable with its divisions and/or subsidiaries in its operations.

This Court has underscored in Egelston v. State University College at Geneseo, supra and in Noble v. University of Rochester, supra, and cases cited therein that Title VII

is remedial legislation and should be liberally construed. An employer such as Litton Industries, Inc. having thorough-going control of all of its operations whether through a division and/or a subsidiary, is properly subject to suit by the plaintiff under Title VII. For many of the same reasons, the McDonald's Corporation was held subject to suit in Chambers v. Franchise Realty Interstate Corp., 12 EPD ¶11,151 (D.C. N.D. Ohio 1976).

While the case arose under the Age Discrimination Act rather than Title VII, the Court, in Woodford v. Kinney Shoe Corp., 7 EPD ¶9238 (N.D. Ga. 1972), held that the parent corporation was held liable for the discriminatory acts of its wholly owned subsidiary. In a subsequent opinion in the same case, Woodford v. Kinney Shoe Corp., 7 EPD ¶9239, 369 F. Supp. 911 (N.D. Ga. 1973), the court ruled that if there is any doubt as to whether a parent corporation is the employer of a plaintiff, summary judgment must be denied. The issue must be decided on trial of all disputed facts.

POINT III

THE PLAINTIFF, WHO FILED HER CLAIMS OF EMPLOYMENT DISCRIMINATION ON FEBRUARY 24, 1975, AFTER HER JANUARY 16, 1975 TERMINATION, TIMELY FILED HER CLAIMS PURSUANT TO TITLE VII AND THE EQUAL PAY ACT

Plaintiff was terminated from employment with the defendants as an outside sales person on or about January 16, 1975. Immediately thereafter, on or about February 24, 1975, while she was still unrepresented by an attorney, she filed her complaints of employment discrimination with the New York State Division of Human Rights. A duplicate filing of her claims with the Equal Employment Opportunity Commission was completed on or about March 27, 1975. (A. 9, 50)

Plaintiff charges that her termination was illegal and discriminatory because it was motivated solely by her sex. She charges that the defendants have and are maintaining patterns, practices, and policies of discrimination against herself and other women by, for example, excluding herself and other women from certain job classifications, denying women equal pay for equal work, hiring only men for the best paying, career oriented jobs, giving men employees training opportunities and denying those opportunities to women, promoting employees so as to benefit men employees, transferring employees so as to benefit men employees, denying women employees titles and job status to which they are entitled by virtue of their job functions, performances, background and

experience, using appointment criteria which are not validated for jobs, varying job standards and/or qualifications for a job and/or qualifications for jobs to accommodate employment of men, fostering an atmosphere in the employment situation calculated to keep women employees in "their place," retaliating against employees for complaining of discrimination. (A. 6-8)

With respect to claims under Title VII of the Civil Rights Act of 1964, there should be a filing with the Equal Employment Opportunity Commission within 300 days from the cessation of the last act of discrimination where there is a state deferral agency, as in this case. 42 U.S.C. 2000e-5(e) A filing with the New York State Division of Human Rights also constitutes a filing with the Equal Employment Opportunity Commission because of the agreement between the two agencies constituting each the agent for the other in the filing of employment discrimination claims. (See copy of agreement attached hereto and made a part hereof as Appendix A).

Since plaintiff filed her claims with the Division on February 24, 1975 and since that filing also constitutes a filing with the Commission, plaintiff timely filed her claims of discrimination within 300 days pursuant to Title VII- in fact, she completed her filing in slightly over 30 days.

Insofar as plaintiff complains of policies, practices, customs and/or usages of discrimination-for example, discriminatory classifications, discriminatory pay policies, discriminatory hiring policies, discriminatory training policies, discriminatory transfer and/or promotion policies, for example, she complains of continuing acts of discrimination. The time by which she need file these claims has not yet begun to run since the policy, practice, custom and/or usage continues. (See Administrative Manual of the Equal Employment Opportunity Commission and the discussion of continuing discrimination therein, attached hereto as Appendix B).

As noted above in the discussion of the employer-employee relationship, one may complain of employment discrimination though not hired (a prospective employee), though not still employed (a former employee and/or retired employee) and though neither a prospective or former employee (an organization complaining of illegal employment practices). Defendants' dwelling on the breaks in plaintiff's employment with the defendants for personal leave or to continue her education between 1964 and her termination by the defendants in January 1975 is simply irrelevant in the analysis of plaintiff's timely filing of her claims. Plaintiff properly complained in February of 1975 of the illegal termination and illegal employment practices of the defendants.

Since plaintiff has unquestionably, timely made complaint of all of the illegal employment practices of the defendants as well as of her illegal termination by the defendants, there is no need for this Court to reach the question which the defendants describe as the "jurisdictional prerequisite" of timely filing. However, were the Court to reach such a consideration, which it noted in the Noble and Egelston cases, was yet undecided by the Court, the Court should hold, as have all courts so far which have squarely and specifically considered the issue, that the administrative filing with the Equal Employment Opportunity Commission is in the nature of a statute of limitations which may be raised by a defendant in defense of claims and administered equitably by the court on hearing claims rather than a "jurisdictional prerequisite."

In Reeb v. Economic Opportunity Atlanta, Inc., 516 F. 2d 924, 928 (5th Cir. 1975), the court held that the time requirements for administrative filings are in the nature of a statute of limitations and equity doctrines apply in the administration of such a statute of limitations. As many courts have noted in interpreting Title VII, the court underscored that the Act contemplates that complaints will be initiated before the Equal Employment Opportunity Commission by lay persons. It is, therefore, reasonable for courts to refuse to apply technical rules strictly. See also, Antonopulos v. Aerojet-General Corp., 295 F. Supp. 1390, 1394 (E.D. Cal. 1968); EEOC v. Nicholson File Co., 408 F. Supp. 229

(D.Conn. 1976).

Plaintiff submits that courts interpreting Title VII have not held that administrative filing is a "jurisdictional prerequisite"and the case law cited by the defendants does not stand for this proposition. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the Court, by way of noting that the EEOC's failure to find reasonable cause did not preclude a suit by the complainant, observed that complainant had satisfied the jurisdictional prerequisite to a federal action by timely filing a charge with the Commission and by receiving and acting upon the Right to Sue Notice. This was not a holding on the question of timely filing.

In Stebbins v. Nationwide Mutual Insurance Co., 382 F. 2d 267 (4th Cir. 1967), cert. denied, 390 U.S. 910 (1960), the court held only that before initiating court action, a plaintiff must seek his/her administrative remedies, including giving the EEOC the opportunity to conciliate; it did not hold that timely filing with the Commission is a "jurisdictional prerequisite."

Similarly, in Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971), the court held that an administrative filing was necessary prior to a federal lawsuit; it did not hold that a timely filing was a "jurisdictional prerequisite."

In Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972), the court in fact used the statute of limitations analogies in its discussion of filing requirements. In DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975), the court commented that commencement of a Title VII action within 90 days of the receipt of the Right to Sue Notice is a "jurisdictional fact." It did not hold that timely filing with the administrative agency is a "jurisdictional prerequisite." This Court has noted in Egelston v. State University College at Geneseo, supra, and in Noble v. University of Rochester, supra, that the Court has not ruled on the question-whether timely filing is a jurisdictional prerequisite or in the nature of a statute of limitations subject to the application of equitable doctrines.

Defendants raise particular objection to plaintiff's equal pay claims. As previously noted, without question, plaintiff can litigate her charge that defendants have a pattern, practice, policy, custom or usage of paying women employees unequally.

Likewise, there is an independent jurisdictional basis, apart from Title VII, for plaintiff to litigate her claims of denial to herself of equal pay for equal work-the Equal Pay Act. Plaintiff alleges that the defendants' denial to her of equal pay for equal work was willful. The defendants knew or should have known of the applicability of

the Equal Pay Act but, notwithstanding their knowledge, in total disregard of the Act, the defendants paid her and other women employees less than it paid men employees for doing the same or similar work when the jobs required equal skill, effort, responsibility and were performed under similar working conditions. Plaintiff further alleges that defendants continued the denial of equal pay for equal work notwithstanding her complaints. In fact, upon her complaining of the unlawful discrimination, defendants intimidated and harassed witnesses. (A.9-12)

Where denial of equal pay for equal work is alleged to be willful, there is a three year period of limitations for the filing of the claims in contrast to the two year period of limitations for non-willful acts. 29 U.S.C. §255(a). Measuring timeliness of the equal pay claims solely from the date of filing this lawsuit, December 30, 1975, plaintiff can properly recover for pay periods as far back as December 1972. Thus, the previous denial to her of equal pay in the offer of a sales position, March, 1973, is actionable. (A. 9) In fact, a separate cause of action accrues under the Equal Pay Act at each regular payday. Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); cert. denied 414 U.S. 822 (1973).

The test on whether the denial of equal pay for equal work is a willful or non-willful violation of the Act is whether the employer knows or has reason to know that its

conduct is covered by the Act. Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir. 1974); cert. denied 419 U.S. 881 (1974). See also, Coleman v. Jiffy June Farms, Inc., 458 F. 2d 1139 (5th Cir. 1972); cert. denied 409 U.S. 948 (1972); Eakin v. Ascension Parish Policy Jury, 294 So. 2d 527 (S.Ct. La. 1974).

Defendants also complain that there is a "jurisdictional" defect in these proceedings because Litton Industries, Inc., has never been fully informed, at the administrative level, of the nature of the charges. The facts lead to an opposite conclusion. Litton Industries, Inc. has fully appeared in the administrative proceedings before the New York State Division of Human Rights. It has received copies of the plaintiff's complaint, amended complaint; it has appeared with witnesses and counsel at "confrontation conferences"; it has been invovled in proceedings for the production of the documents relating not only to the discrimination against the plaintiff but relating to the pattern and practice discrimination. (A. 133-135)

The filing of her claims with the Division also constituted a filing of plaintiff's claims with the Equal Employment Opportunity Commission. However, defendants had even further notice of the claims with the Commission mailing a Notice of Charge of Employment Discrimination to Litton Industries, Inc. and McBee Systems on April 28, 1975. Further,

the Commission named both Litton Industries, Inc. and McBee Systems in the Right to Sue Notice and forwarded a copy of the same to the defendants.

Since defendants had all fully appeared in the Division proceeding initiated in February 1975, by counsel, they cannot even claim ignorance of the law, practice and rules governing the handling of employment discrimination claims. The Division and the Commission file on the claims have been and are fully available to the defendants and/or their attorneys. They have full access to review the complaint itself, any amendments and/or any documents submitted by the plaintiff and/or any other person.

For the first time, in their brief on appeal herein, the defendants suggest that the administrative complaints are not broad enough to encompass the complaint filed here. Specifically, defendants suggest that while plaintiff makes a "brief reference" in her Division complaint regarding discrimination in March 1973, "...there is no claim anywhere in the State Division original or Amended Complaint that plaintiff was discriminated against in any way during the period of her original employment."(Appellants' Brief, p.20) However, brief, the reference to the discrimination in employment in 1973, plaintiff has made complaint of that discrimination and defendants have been on notice of the discrimination. Complaints of employment discrimination are to be liberally

construed; complaints are not to be read for compliance with technical rules of pleading. Love v. Pullman, 404 U.S. 522 (1972).

Further, plaintiff in both the complaint and amendment to the administrative complaint adequately puts defendants on notice of the scope of her charges. She alleges in the complaint that she has been denied equal terms, conditions and privileges of employment and in the amended complaint she alleges that the denial to her of equal terms, conditions and privileges of employment and the terminating of her employment because of sex are a part of a pattern, practice, custom and usage of discrimination engaged in by the defendants on the basis of a person's sex. (A. 168-171)[1]

[1]There is no formal pleading of claims of employment discrimination before the administrative agency. A complainant may amend the charge to clarify or amplify allegations. The amendments relate back to the original filing date. 29 C.F.R. § 1601.11(b). Even informal participation by a defendant in proceedings before the Commission is deemed sufficient to conclude that there was notice of the Commission proceedings. Thornton v. East Texas Motor Freight, 497 F.2d 416(6th Cir. 1974).

POINT IV

THE COMPLAINT STATES CLAIMS PURSUANT TO TITLE VII AND THE EQUAL PAY ACT

From the foregoing discussion and from the citation of the foregoing authority, it is demonstrated that the complaint herein states claims both under Title VII and the Equal Pay Act. Plaintiff, acting immediately upon her termination from employment which she alleges was occasioned by defendants' desire to have a man working in sales rather than a woman, filed her claims relating to the illegal termination as well as to illegal employment practices with respect to classification, pay, transfer, promotion, training, for example.

These are the kinds of claims specifically actionable pursuant to Title VII and/or the Equal Pay Act. Reading the complaint in its most favorable light, as required as a matter of law at this stage, there is no basis whatever for dismissing the complaint as to either Title VII or the Equal Pay Act for failure to state a claim.[1]

Notwithstanding that the complaint herein is typical of employment discrimination complaints, see for example, the complaints in Egelston v. State University College at Geneseo, and Noble v. University of Rochester, defendants

[1]The District Court declined to certify any question herein of failure to state a claim.

have attempted to strike the pattern and practice allegations asserting that the allegations are imperfect and/or improper attempts on the part of the plaintiff to "obtain relief on behalf of a class."

As plaintiff noted for the District Court, she does not seek to constitute this lawsuit a class action. She does however, claim that the employment discrimination practiced by the defendants is company-wide discrimination and that the defendants engage in a pattern, practice, policy, custom and/or usage of discriminating against her and other women employees. (A. 50, 51)

Plaintiff is seeking relief for herself as an individual employee of the defendants. She does not seek to constitute herself a representative of other employees, standing as a class representative, to collect the money damages from the defendants to which these other women employees are entitled.

However, plaintiff in succeeding in eliminating illegal employment policies, will benefit other employees. As the court noted in Bowe v. Colgage-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), a claim of employment discrimination is by definition a class claim. An illegal policy naturally affects more than one employee. An individual plaintiff has the right to request injunctive relief from all illegal employment practices pursuant to Title VII of the Civil Rights Act of 1964. A court may grant a plaintiff an injunction to

enjoin a defendant from engaging in unlawful employment practices and may order such affirmative relief as may be appropriate. 42 U.S.C. §2000e-5(g). Plaintiff requests that the court grant such an injunction to prevent the defendants from continuing or maintaining any policy, practice, usage or custom of denying, abridging, withholding, conditioning, limiting or otherwise interferring with the rights of the plaintiff and other women employees to enjoy equal employment opportunities as secured by Title VII.

POINT V

ALL OF THE DOCUMENTS REQUESTED BY THE PLAINTIFF ARE RELEVANT AS A MATTER OF LAW IN AN EMPLOYMENT DISCRIMINATION CASE AND MUST BE PRODUCED

Finally, defendants attempt to appeal what is certainly the non-final, interlocutory order of the District Court directing that defendants comply with plaintiff's First Notice to Produce. American Express Warehousing, Ltd.v. Transamerica Ins. Co., 380 F. 2d 277 (2nd Cir. 1967). See generally, 9 Moore's Federal Practice ¶110.13 (2).

Even if this matter were properly before the Court, the District Court must be affirmed in its decision to direct discovery. While plaintiff's requests in the First Notice to Produce are initial requests only, every item is properly requested. Plaintiff has carefully explained the basis for each request. (A.52-56) Defendants have filed merely generalized objections to production which, as a matter of law,

are insufficient.

In an employment discrimination case, the plaintiff is entitled to documentary evidence since statistical evidence of the employer's employment practices, policies, customs and usages are relevant whether the case be characterized as an "individual" or as a "class" complaint. McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973); Brown v. Gaston Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972), cert. denied 409 U.S. 982 (1972); Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973).

Plaintiff is entitled to statistical, documentary evidence, both as to the pre-act conduct and post-act conduct in order to show the employer's overall pattern of conduct. Past discrimination can have a direct impact on current employees. Information as to hiring, firing, promotion and demotion of minorities on a plant-wide basis and within departments was deemed relevant in Rich v. Martin-Marietta Corp., 522 F. 2d 333 (10th Cir. 1975). In United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2nd Cir. 1971), the court used statistics to illustrate the finding of a general pattern of racial discrimination. In United States v. Dillon Supply Co., 429 F.2d 800 (4th Cir. 1970), the court held that it was error for the lower court to limit statistical proof and other evidence to present specific acts of discrimination. Any past specific or general act, practice, policy or pattern of discrimination ought to be introduced for the purpose of

demonstrating present discriminatory acts. See also, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Leeway Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); United States v. Jackson Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); Marquez v. Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); Graniteville Co. v. E.E.O.C. 438 F.2d 32 (4th Cir. 1971).

The personnel records of employees are directly relevant to establish the plaintiff's claims. In order to compare the terms, conditions, benefits and privileges of employment of the plaintiff to that of other employees, it is necessary to obtain the information in these files. The files requested are in the possession and control of the defendants. Such files are routinely used in employment discrimination case proof, and courts require the production of such information. E.E.O.C. v. Ducommun Metals and Supply Co., 2 EPD ¶10, 067 (S.D. Texas 1969). See also, Molybdenum Corp. of America v. E.E.O.C., 2 EPD ¶10,010 (D.N. M. 1969) where the court ordered that the defendant give the Equal Employment Opportunity Commission access to certain personnel files. If the personnel files are material and necessary to the prosecution of the case, an assertion of confidentiality will not defeat the production. Watson v. Mix, 38 A.D. 2d 779 (4th Dept. 1972). It makes no difference that in the case at bar, that the plaintiff is

requesting the production of t[illegible]onnel files rather than the Equal Employment Opportunity Co[illegible]mission. "Any information relevant-in a discovery sense-to an EEOC investigation is likewise relevant to the private attorney-general, either in his individual role or in his capacity as the claimed representative of the class." Burns v. Thiokol Chemical Corp., 483 F.2d 300, 305 (5th Cir. 1973).

CONCLUSION

For the foregoing reasons, plaintiff requests that the court deny defendants' petition for review of certified questions and/or, should the court entertain review of any question herein, plaintiff requests that the Court affirm the District Court.

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December 6, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Appellee's Brief on the defendants-appellants by my causing 2 copies thereof to be mailed to attorneys for the defendants-appellants, Brennan, Centner, Palermo & Blauvelt, Anthony R. Palermo, Esq., of Counsel, 500 Reynolds Arcade Building, Rochester, New York this 6th day of December, 1976.

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December 6, 1976
Rochester, New York

Appendix A

NEW YORK STATE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

MEMORANDUM OF UNDERSTANDING

In order to provide for efficient cooperation and coordination of enforcement activities under Title VII of the Civil Rights Act of 1964 (the "Act") and the Human Rights Law of The State of New York the Equal Employment Opportunity Commission (the "Commission") and The New York State Division of Human Rights (the "Agency") hereby express adherence to the following procedure for the processing and investigation of charges of discrimination in employment:

1. When an employment discrimination charge is filed with the Agency, the Agency will furnish the charging party with literature prepared by the Commission describing his federal rights and advise him, at some time before the expiration of the 60- or 120-day period of deference provided by section 706(b) of the Act of his right to file a complaint with the Commission. If the charging party at the time of filing a charge with the Agency, or at any other time, indicates to the Agency that he wishes to file with the Commission, the Agency will notify the Commission (on a form to be supplied by the Commission). Pursuant to Section 705(f), the Commission by this agreement designates the Agency as a State Office of the Commission for the sole purpose of receiving such charges on behalf of the Commission, and the Agency agrees to receive such charges. The Commission will consider the charge to be filed with the Commission at the expiration of the period of deference. Where the charging party has indicated that he wishes to file with the Commission and the case is terminated by the Agency, the Commission will be notified by the Agency of the nature and basis of the disposition (on a form to be supplied by the Commission). The Commission will consider the charge to be filed with the Commission at the time of such state agency termination. Pursuant to Section 705(f), the Commission by this agreement designates the Agency as a State office of the Commission for the sole purpose of receiving such charges on behalf of the Commission, and the Agency agrees to receive such charges. The Commission will consider the charge to be filed with the Commission when the state agency terminates its proceedings.

2. When the Commission receives a charge which must be deferred to the Agency under section 706(b) of the Act, the Commission will send by registered mail a copy of the charge, or the

original, where requested, to the Agency, together with all other available information on the case. The Agency hereby designates the Commission to serve as its agent for the purpose of the receipt of charges and agrees that the period of deference provided by section 706(b) commences to run when the charge is sent. The Commission will notify the charging party of the deferral and the date thereof and will advise him that he should cooperate with the Agency in its handling of his case and that the Commission will consider the charge to be filed with the Commission at the expiration of the period of deference unless it is notified by the charging party that the charge has been settled to his satisfaction. The Agency will periodically inform the Commission (on a form to be supplied by the Commission) of all actions taken on charges deferred to the Agency. If the Agency terminates its proceedings prior to the expiration of the period of deference the procedure outlined in paragraph 1 will apply.

3. Upon the expiration of the period of deference the Commission will consider the charge to be filed with the Commission. The Commission will develop and forward to the Agency standards of investigation, finding, and remedy in certain classes of cases. In those classes of cases the Commission may temporarily refrain from actually processing the charge, and will so notify the Agency, if it appears that the Agency will meet those standards in the processing of that case. In addition, if the Agency consistently meets those standards of case processing the Commission may adopt the investigative findings of the Agency when they result in a formal written finding that cause exists to believe that an unlawful employment practice exists; and may approve Agency Conciliation Agreements or Cease and Desist Orders when they are accepted by the charging party and when they effectuate the basis remedial purposes of the Commission. The Commission will assure, however, that, where the charging party wishes to assert his federal rights or where the interest of effective enforcement of Title VII requires it the charge will be processed promptly. Provided, however, that such procedures in no way shall detract from the responsibility of the Agency under State law.

4. In the course of its investigation of a charge the Commission shall have access to relevant information in the possession of the Agency, including its investigative files with respect to the same or related cases, and for this purpose representatives of the Commission will be permitted to copy or obtain copies of pertinent documents, and to utilize the same in proceedings under Title VII, provided that information on conciliation attempts will not be made public. The Commission shall in like circumstances grant to representatives of the Agency similar access to relevant information in its possession. The

Agency may utilize such information but may not make it public except as part of enforcement proceedings under its statute. To the extent permitted by law and by applicable policies and regulations similar access will be granted also to information in the possession of other federal agencies. However, the Commission and the Agency agree that information on conciliation attempts will not be made public where such disclosure would be contrary to the statutory provisions or policies applicable to conciliation proceedings. Provided, however, the sharing of information on conciliation by the Agency and the Commission with each other shall not be deemed to be making such information public.

5. Where the same or related charges are pending before the Agency and the Commission, the Commission and the Agency will endeavor through consulation and mutual assistance to provide for efficient processing of the charges. The Commission may permit personnel of the Agency to accompany Commission personnel on investigations and conciliation of cases falling within their joint jurisdiction. Provided, however, that such procedures in no way shall detract from the responsibility of the Commission under Federal law. The Agency will permit personnel of the Commission to accompany and observe Agency personnel on investigations and conciliation of cases falling within their joint jurisdiction. Provided, however, that such procedures in no way shall detract from the responsibility of the Agency under State law.

6. In accordance with section 709(b) the Commission may with the concurrence of the Agency designate the Agency or its employees to act for it in the course of investigation or conciliation and may reimburse the Agency or its employees for such services.

7. Settlement of a case whether or not the case was deferred by the Commission or filed with the Agency on terms satisfactory to the Agency shall not be deemed by the Commission dispositive of the charging party's rights under Federal law inless the Commission is made a party to the agreement or the charging party has accepted the terms as equitable and executed a written voluntary waiver (form to be supplied by the Commission) evidencing such acceptance.

8. Upon request from the Commission the Agency will provide the appropriate Field Office of the Commission with a copy of all charges or complaints filed with it under State law in addition to notifying the charging parties of their Federal rights as provided in paragraph 1 above.

9. If a charge is filed by a member of the Commission alleging an unlawful practice occurring within the jurisdiction of the Agency, the Commission will notify the Agency. If the Agency requests time to process the charge the procedures outlined above will be followed.

10. The Commission and the Agency each shall have the power to cancel this Memorandum of Understanding at any time by mailing written notice to the other's principal office. Upon such cancellation, neither the Commission nor this Agency shall have any further obligation under, or on account of, this Memorandum of Understanding. Except that, subject to appropriate audit, the Commission shall make any payments due under existing contracts for work actually performed prior to such cancellation.

Julius M. Cobb
Title: Commissioner
Agency: New York State Division of Human Rights

June 20, 1972
Date

William H. Brown III
Chairman
Equal Employment Opportunity Commission

July 6, 1972
Date

Approved by Commission
6/7/71

Appendix B

SECTION 208--CONTINUING VIOLATION

Contents

[¶ 4101]

208.1 Introduction - Policy/Policy-Application Distinction

A Charging Party may attack a current employment policy, in addition to past applications of that policy; and, since a policy is by nature continuing, a "policy" charge always is timely filed (See IM 204-Timeliness). Thus the Commission's jurisdiction vests when it receives a charge which merely alleges the current existence of an unlawful policy. The Commission's jurisdiction does not await proof that the alleged policy exists in fact, or has been applied within 180 (or 300) days of the filing date. These are facts relevant to the merits of the charge, rather than to the Commission's jurisdiction to investigate it.

Charges which do not specifically include the work "policy", or otherwise suggest a continuing course of conduct, normally may be read, in context, to allege a continuing, i.e., policy-type, violation. The purpose of this Section is to alert the reader to the policy/policy-application distinction and the "continuing violation" approach to seemingly untimely charges.

[¶ 4102]

208.2 Traditional or Past Practices as Evidence of Existence of Current Policy

Whether an allegedly continuing practice, i.e., a present policy, exists is, as noted above, a question of fact. Charging Party has the burden of proceeding on whether an alleged policy in fact was extant during the 180 or 300-day period preceding the filing of the charge and/or thereafter. Barring admissions from Respondent, Charging Party must evidence sufficient specific acts (hiring acts, promotion

acts, etc.) from which an underlying policy (discriminatory hiring policy, promotion policy, etc.) reasonably may be inferred. Those specific acts need not have occurred during the 180 or 300-day period; it is enough that they occurred over a period of time directly preceding the 180 or 300-day period. The Commission and the courts will infer, absent other facts, that the thus inferred policy carried over into, and in fact existed during, the 180 or 300-day period. U.S. v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969), 2 EPD 10,083; CD 70-396, CCH 6101; CD 71-1101, CCH 6198. See also Cox v. U.S. Gypsum Co., 409 F.2d 289 (7th Cir. 1969), 2 EPD 9988 and Tooles v. Kellogg Company, 336 F.Supp. 142 (D. Neb. 1972) 4 EPD 7661. In Tooles, the court stated:

> "This Court adopts what it finds the better view that where the discrimination has been of a continuing nature, as herein alleged, evidence of prior acts against plaintiff must be allowed, to show the continuing pattern of discrimination which has occurred and continued to occur within the 210 day limit preceding the date the complaint was brought.

[¶4103]

208.3 Specific Situations Held to Constitute Continuing Allegations

(a) PROMOTION

Where an individual is denied a promotion, but the reasons for such denial would continue to frustrate his future efforts to attain a similar position (e.g., lack of high school education; lack of departmental seniority; failure to pass test, etc.) the failure to promote the individual may be deemed to constitute a continuing policy. See CD 71-1151, CCH 6208. Accord: Mack v. General Electric Co., 329 F.Supp. 72 (E.D. Pa. 1971), 3 EPD 8272 at 6. "In addition, we think a denial of upgrading opportunities to discriminate against an employee at least until he is upgraded as he deserves and we thus regard a discriminatory failure to upgrade as a continuing violation of Title VII." Likewise, in Jamison v. Olga Coal Co., ___ F.Supp. ___ (D.W. Va. 1971), 4 EPD 7787, the court ruled that an allegation of discriminatory promotions was continuing as to general policies and as to the failure of unions to redress the situation even though a specific act complained of by Charging Party occurred more than 90 days prior to filing of the charge and, indeed, before the effective date of Title VII.

> ... the charge before the EEOC involved two separate areas of discrimination, one general

and one specific. While it is true that the specific (charge of discrimination with respect to the promotion...) relates to conduct on the parts of defendants prior to the effective date of Title VII and to an incident occurring more than 90 days before the filing of the charge ... nevertheless the general charge of a denial of promotions to Negroes to better jobs and the failure on the part of the defendant unions to seek redress of such discrimination is not confined to the same time.

Accord, Tooles v. Kellogg, supra. But see, Jennings v. Illinois Central R.R. Co., ___ F.Supp. ___ (W.D. Tenn 1970), 3 EPD 8012, aff'd per curiam, ___ F.2d ___ (6th Cir. 1971), 3 EPD 8275.

(b) TRANSFERS

The same theory applies to requests for transfers as to promotions. In Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972), 4 EPD 7751, the lower court held that oral reapplications for transfer would not make a prior rejection timely by establishing a continuing violation. HELD: reversed.

"We cannot agree with the district court that a discriminatory labor practice may not be a continuing act. To so hold the facts of this case would permit discriminatory acts to go unrebuked, a construction far too restrictive and alien to the liberal construction we have previously given the Civil Rights Act ... there is no need to lock the courthouse door to his claim solely because he has alleged a contemporary course of conduct as an act of discrimination." (But see, Younger v. Glamorgan Pipe and Foundry Co., 310 F.Supp. 195 (W.D. Va. 1969), 2 EPD 10,059.)

(c) LAYOFF AND RECALL

Cox v. U.S. Gypsum, supra:

While layoff may be a single act, the failure to recall constitutes a continuing violation. "In so concluding we consider the following facts:

(1) A layoff, as distinguished from discharge or quitting, suggests a possibility of re-employment. (2) A layman's claim of "continuing" discrimination, after a discriminatory layoff, readily suggests that he claims there has been subsequent recall or new hiring which discriminates against him. (3) The record shows that the company had bound itself, by its collective bargaining agreement, to consider seniority in making a recall, and the agreement provides that an employee does not lose seniority by reason of layoff until one year has expired. (4) The Commission chose to accept these charges as timely. (5) The company received notices of other charges of similar current discrimination at or about the same time."

(d) PENSION PLANS

Leading case is Mixson v. Southern Bell Telephone and Tele. Co., 334 F.Supp 525 (N.D. Ga. 1971), 4 EPD 7606 and the companion Commission Decision, CD 71-1413, CCH 6225. The court concludes that Respondent's failure to pay widow death benefits is an allegation of a continuing violation. But see McCarty v. Boeing Company, 321 F.Supp 1100 (W.D. Wash. 1970), 3 EPD 8056.

(e) HIRING AND ADMISSION TO UNION

Watson v. Limbach Corp., ___ F.Supp. ___ (S.D. Ohio 1971), 4 EPD 7648. Charging Party applied for a job with Respondent Employer and membership in Respondent Union:

"It is the opinion of the court that since the complaint before us clearly alleges an ongoing pattern of discrimination against plaintiff and his class, it is not necessary that plaintiff be in strict compliance with §2000e-5d. ... [A] complaint...may not be dismissed on the grounds that it was untimely filed where the suit challenges the maintenance of an alleged discriminatory system rather than one isolated instance..."

Accord: EEOC v. Local 189, Plumbers and Pipefitters, 311 F.Supp. 464 (S.D. Ohio 1970) 2 EPD 10,181; Dobbins v. Local 212, IBEW, 292 F.Supp. 413 (S.D. Ohio 1968). For the proposition that a hiring policy may constitute a continuing violation, see also CD 72-1702, CCH 6361.

[¶ 4104]

208.4 Continuing Violations - Mootness

Individual relief for Charging Party, or mootness of a specific application of a continuing policy, does not bar adjudication of the lawfulness of the policy itself. In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), 3 EPD 8247, the exact position sought by plaintiff was abolished during the pendency of the court action. Respondent sought to have the case dismissed for mootness. In approving denial of this motion the court reasoned that:

> Similarly here, the burden which Southern Pacific's general labor policy and the state statutes in question place on Southern Pacific's employment of women remains and controls the company's future work assignments. Moreover, the fact that this cause arose under Title VII of the Civil Rights Act of 1964 provides additional support for the view that the action has not been mooted by the closing of the Thermal agency. That Title is so designed that, in the attainment of its objectives, the administrative agency primarily renders a conciliation service. The ultimate sanction is judicial enforcement initiated by individuals who are aggrieved. Section 706(e) of the Act, 42 U.S.C. §2000e-5(e). In many such cases, including this one, declaratory and injunctive relief is sought, the need for which is not necessarily dependent upon proof that a particular discrimination has continued.
>
> Thus, while the resulting litigation is private in form, it is intended to effectuate the policies of the legislation. So considered, such a suit constitutes more than the assertion of a private claim and, consequently, it is not necessarily defeated by the disappearance of the particular grievance which gave rise to the action. The controverted issue of unlawful employer discrimination remains; it may, and should be, judicially resolved and relief granted or denied. See Jenkins v. United Gas Corp., 400 F.2d 28, 30-33, (5th Cir. 1968), 1 EPD 9908.
>
> The discontinuance of the particular grievance which gave rise to this action may call for a denial of some of the relief requested. See Parham v. Southwestern Bell Tel. Co., 3 EPD 8021 433 F.2d 421, 429 (8th Cir. 1970). It does not moot the litigation.

[Section 209 begins on page 3651.]